United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7475

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

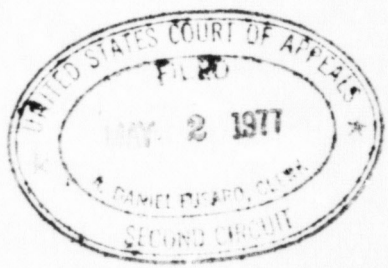
JOSEPHINA DUCHESNE, et. al.

Plaintiffs-Appellants

-against-

JULE M. SUGARMAN, et. al.

Defendants-Appellees



APPELLANTS REPLY BRIEF TO APPELLEES
SUGARMAN, BEINE AND FASS

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UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

Defendants Sugarman, Beine, and Fass have argued in their brief that they are not liable for the constitutional violation suffered by plaintiffs because these defendants had no knowledge of plaintiffs, and because they took no action with respect to plaintiffs; and because respondeat superior does not apply to 1983 actions. This Reply Brief will answer defendants' argument.

This Reply Brief is filed on April 28, 1977 because defendants' answering brief was not received by appellants' counsel until April 27, 1977

Point I

DEFENDANTS' FAILURE TO ACT AND FAILURE TO PERFORM THEIR DUTY TO SUPERVISE RESULTED IN PLAINTIFFS' SUFFERING A DENIAL OF THEIR BASIC CONSTITUTIONAL RIGHTS AND DEFENDANTS ARE LIABLE NOTWITHSTANDING THE INAPPLICABILITY OF RESPONDEAT SUPERIOR

Plaintiffs do not rely on the doctrine of respondeat superior in arguing that defendants Sugarman, Beine and Fass (hereinafter defendants) are liable in this action. Plaintiffs assert that defendants' personal act of omission and defendants' failure to act within their realm of responsibility resulted in plaintiffs' constitutional violation. Therefore, defendants are liable for the natural consequences of their conduct notwithstanding respondeat superior.

Plaintiffs argue that they have a fundamental constitutional right to maintain their family unit. It has been recognized that:

> [a] plethora of opinions by the United States Supreme Court, addressed to the nature of constitutional interests implicated where various aspects of family life are threatened, indicate that [plaintiffs] have a fundamental right to family integrity. Alsager v. District Court of Polk Cty., Iowa, 406 F.Supp. 10 at 15 aff'd 545 F2d 1137 (1976)

Defendants do not dispute the fact that plaintiffs have this constitutional right, nor do defendants deny that plaintiffs suffered a deprivation of this constitutional right. Defendants merely argue that they took no action with respect to plaintiffs and that they, therefore, are not liable.

Plaintiffs answer that it is defendants' admitted failure to act which resulted in plaintiffs constitutional deprivation and it is this failure to act which establishes defendants' liability. The record shows that defendants are child welfare

officials who are responsible by statute and by defendants own admission for the administration of child welfare operations in New York City (A. Statement of Evidence, p. 4-5, para. 1, 5, 7, 8, 10; p. 8. para 1). In New York City child welfare operations are performed by the Bureau of Child Welfare (hereinafter BCW) and defendants are officials of this agency. Defendants are responsible for supervising child welfare operation and for establishing and implementing practices and policies of BCW, and child-care agencies such as defendants St. Joseph's and Foundling Hospital which hold children in conjunction with BCW.

The record in this case shows that defendants acknowledged that there is a general policy and practice whereby defendants in an ex parte action will take custody of a child without parental consent or court order and will continue custody despite the lack of legal authority so long as defendants consider their custody warranted. This type of custody could, according to the testimony at trial, continue indefinitely. Defendants Beine, Fass, and Foundling Hospital acknowleged this practice in their testimory (A. Statement of Evidence, p. 5-6, para. 14, 15; p. 8, para. 3,4; p. 13, para. 3,4). It has been established, therefore, that defendants acknowledge and sanction the existence of this ex parte policy and practice. This practice is in violation of the basic constitutional right to maintain a family unit free of state interference except in a due process manner with notice and hearing. It is obvious that infant plaintiffs were detained for twenty-six months in accordance with this policy.

This policy and practice is unconstitutional, as well as violative of the New York Social Services Law and Family Court Act. Defendants who are responsible for implementing and supervising policies and practices of BCW are responsible for the existence of this practice. Accordingly , defendants are responsible for plaintiffs' constitutional deprivation which was the natural consequence of this practice and policy. In permitting this ex parte practice and policy to exist and in failing to instruct and issue written guidelines informing BCW and child care agencies of the requirement of seeking judicial authorization for custody, defendants have conducted themselves in such a way as to violate plaintiffs' constitutional rights. Plaintiffs do not hold defendants vicariously liable for the wrong doing of others, but rather defendants are liable for their own wrong doing and failure to act in the realm of their own area of responsibility. Defendants failed to understand and are ignorant of their constitutional and statutory obligation to obtain judicial authority for their ex parte act of assuming custody of a child, and defendants failed to issue written guidelines instructing the staff of BCW and child care agencies of the obligation to obtain legal authorization for an ex parte decision to assume and retain custody of a child (A. Statement of Evidence, p.2. para. 7; p. 6, para. 17; p. 8, para. 6).

Failure to supervise has been held actionable in a 1983 action. See Dewell v. Lawson, 489 F2d 877 (10th Cir., 1974) where a diabetic who was incarcerated suffered injury because of an

alleged lack of treatment. The Dewell court held that a 1983 cause of action had been stated where it was possible to establish that the defendant police chief had failed to establish procedures whereby jail personnel would be advised of missing persons such as plaintiff who were reported to be diabetics. The court recognized that the police chief would be liable if it were established that he failed to perform a duty imposed upon him by law which resulted in a deprivation of constitutional rights. In Bryan v. Jones 530 F2d 1210 (5th Cir.; 1976) a prisoner brought a civil rights action where he was incarcerated for approximately one month beyond the authorized period. The defendant sheriff argued that the incarceration continued because of a typographical error. Although the sheriff received a notice to release plaintiff the record showed, due to the typographical error, that the plaintiff had a warrant authorizing incarceration. The Bryan court held:

> ...the jailer will be held to a high level of reasonableness as to his own actions. If he negligently establishes a record keeping system in which errors of this kind are likely he will be held liable. Bryan at 1215.

In Jones v. Diamond 519 F2d 1090 (5th Cir., 1975) the court recognized that a failure to act where state law imposed a duty on county officials to inspect jails and take remedial action was actionable in a 1983 case.

In accordance with the law set forth above defendants are subject to liability because of their failure to act and their failure to supervise and to establish procedures and regulations which would insure against interference without due process with the constitutional right to maintain a family.

Defendants have noted that defendant Beine testified that

this was the first case of its type that she knew of. This will not justify the constitutional violation suffered by plaintiffs. Nor is this persuasive in view of the fact that in People ex rel Johnson v. Michael, 39 Misc2d 365 (1963) defendants were warned by the court against taking custody illegally without court order, and in view of the fact that defendant Princeler who worked at BCW for ten years testified that on other occassions custody had been assumed without parental consent or court authorization (A. Statement of Evidence, p. 1, ¶6). Defendant Beine also testified that sometimes placements occur without court order or consent and that such placements could continue indefinitely so long as it is thought to be in the best interest of the child. Therefore although defendant Beine testified that she had no knowledge of specific cases like plaintiffs' her testimony showed that she had general knowledge of the practice of continuing ex parte placements without court authorization.

Plaintiffs were entitled to have the jury decide whether defendants failed to perform their duty to supervise, whether defendants acted in good faith, whether defendants should have reasonably realized the need for establishing guidelines and follow-up procedures where children were taken in an ex parte manner without legal authority, and whether defendants were liable for the constitutional deprivation suffered by plaintiffs.

Defendants rely on Arroyo v. Schaefer, 548 F2d 47 (2nd Cir., 1977) and Williams v. Vincent 508 F2d 541 (2nd Cir., 1974). These cases will not permit defendants to escape liability. Williams recognized that a prison superintendent is liable if it can be shown that he has some personal responsibility for the conduct of a prison guard. Because the act complained of appeared to be the result of a split second decision by the prison guard to avoid danger this court held that the complaint would be dismissed against the superintendent because he was not personally responsible for such conduct. In the case at bar there is personal responsibility by defendants who are required to know the law with respect to child welfare and to supervise and administer the child welfare operations of BCW in a lawful manner. Defendants failed to perforem this duty and as a result BCW operated in a manner which deprived plaintiffs of their constitutional rights. This is different from the situation in Williams which dealt not with a practice, but rather with a split-second individual reaction. It should be emphasized that Williams noted that there was no history of a similar incident alleged and that the complaint could be amended if facts of personal responsibility arose. The decision in Arroyo held that the conduct complained of did not amount to a constitutional violation of cruel and inhuman punishment, but rather a reflex action by a guard taken in an emergency, and that defendants had not known of plaintiffs' request for medical treatment and refused it. This is not the situation in the case at bar where the action complained of was not one of quick reflex, but rather a policy decision which continued for over two years. Despite Williams and Arroyo the record of this case shows defendants failed to perform theire duty to supervise.

CONCLUSION

For the reasons stated herein it is respectfully requested that this appeal be granted in all respects and for such other further and different relief as to the court may seem just.

Respectfully submitted

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Attorney for Appellants

Dated: New York, New York
April 28, 1977

ATTORNEY'S AFFIRMATION OF SERVICE

Re: Duchesne et. al. v. Sugarman
et. al.

76/7475

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Lisa H. Blitman, an attorney duly admitted to practice in the State of New York, hereby affirms the following to be true under penalty of perjury:

That she is over the age of 18 years and that she is not a party to the above-referenced proceeding and that her business address is 15 Park Row, New York, New York 10038.

That on April 28, 1977 she served a copy of Reply Brief in the above-referenced proceeding.

That these papers were served by personally delivering to ~~mailing~~ a copy of Bodell & Magovern, 102 E. 35th St. NYC. New York, New York. New York, Corporation Counsel, Municipal Bldg, N.Y.C. Counsel and ~~mailing~~

Lisa H. Blitman

Dated: New York, New York
April 28, 1977